IS (ALSO) *MAGNA CARTA* AN ECCLESIASTICAL DOCUMENT? THE PREEMINENT ROLE OF THE CHURCH IN THE DEVELOPMENT OF ENGLISH LEGAL SYSTEM.

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Abstract: Recent studies suggest that Magna Carta could have been published mainly by the Church, which had a specific interest in spreading copies of the charter, and the technical ability to write, distribute and preserve them. These researches confirm the special sway of the Church on the formation of English legal system. First, thanks to the action of the Ecclesiastical Courts, which had a jurisdiction larger than that possessed by any other Ecclesiastical Courts in Europe. Then, in the decisive importance of the cultural background, based on canon law, of the holders of administrative and judicial offices of the kingdom. Finally, for the concrete contents of rules transmitted to the Equity system, and generally to English law. The influence of ecclesiastical jurisdiction was indeed decisive in marriage, in defining rights and interests in estates, in the development of contracts; but it was paramount even in the concrete shaping of rules and institutions nowadays surrounded by «an aura of Englishness», like wills and trusts. The role of the Church in the history of Common law tradition is so evident, that «any account of English legal development that does not take account of ecclesiastical jurisdiction is therefore an incomplete account».

Key words: Magna Carta, Ecclesiastical Courts, canon law, Equity system.

Riassunto: Recenti studi dimostrano che la Magna Carta sarebbe stata pubblicata soprattutto dalla Chiesa, che aveva uno specifico interesse nel diffondere copie dello statuto, e le abilità tecniche per scriverle, distribuirle e conservarle. Queste ricerche confermano la speciale influenza della Chiesa sulla formazione dell'ordinamento giuridico inglese. In primo luogo, grazie all'azione delle Corti ecclesiastiche, che ebbero una giurisdizione più ampia rispetto a quella che possedevano tutte le altre Corti ecclesiastiche in Europa. In secondo luogo, per la decisiva importanza del *background* culturale, basato sul diritto canonico, dei titolari degli uffici amministrativi e giudiziari del regno. Infine, per i contenuti concreti delle regole trasmesse al sistema di *Equity*, e in generale al diritto inglese.L'influenza della giurisdizione ecclesiastica fu, infatti, decisiva in tema di matrimonio, nella determinazione dei diritti e degli interessi nelle proprietà, nell'evoluzione della disciplina dei contratti; ma è stata fondamentale anche nella concreta elaborazione

di regole e istituzioni tutt'oggi circondate da un'aura di «*Englishness*», come il testamento e il *trust*. Il ruolo della Chiesa nella storia della tradizione del Common law è così evidente che «*any account of English legal development that does not take account of ecclesiastical jurisdiction is therefore an incomplete account*».

Parole chiave: Magna Carta, Corti ecclesiastiche, diritto canonico, sistema di *equity*.

1. The Church and the Magna Carta

In 1215, besides the fourth Lateran Council, another great historical event occurred. On 15 June, in the water meadow of Runnymede, near London, King John of England puts his seal on the Magna Carta, declaring that he sealed it "*from reverence for God and for the salvation of our soul […] for the honour of God and the exaltation of the Holy Church".*

It was the first time that a King had to declare his fealty to a charter, so that he was to be subject to a written law: in the terms of his own prior oaths, but imposed and sustained by his own subjects.

His advisers included two archbishops, seven bishops, and the Master of the Order of the Temple in England, Aymeric de Saint Maur. The resolute influence of Stephen Langton, Archbishop of Canterbury, in the promotion of the Church's interests, is evident since clause 1 of the Charter: *"in the first place we have granted to God, and by our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate".*

As it has been noted, *"this guarantee for the Church was made to God, and so was inviolable. It was made freely and by a promise made prior to the dispute between [King] John [himself] and the barons, and so was conscionable. It was commended to the king's heirs, and so was designed to be irrevocable"*[1]. It is interesting to remind that an English scholar recently affirmed that Magna Carta

[1] Griffith-Jones, R. & Hill, M., «The Relevance and Resonance of the Great Charter», in *Magna Carta, Religion and the Rule of Law*, Griffith-Jones, R. & Hill, M. (eds.), Cambridge 2015, p. 4.

"was first and foremost a religious document […] a covenant between God, the king and the people, laying down the principles on which the king would reign"[2].

This affirmation of the liberty of the Church had very practical consequences (freedom of the bishops'election from any interference of the King; privileges for the clergy; the attribution of many subjects of private and criminal law to the Ecclesiastical Courts[3]), but it also implied a limit to the power of the King. Therefore, the recognition of the freedom of the Church contributed to the confirmation of the autonomy and liberty of the individuals, and was essential, then, in giving rise to the notion of equal subjection under law.

The power of the monarchy was not absolute anymore, because the rule of law, first affirmed to guarantee the autonomy of the Church, presided over the entire action of the king, who could not escape his oath, i.e. his duty to respect the law. Since then, and even if the principle was not explicitly declared in the Charter, English monarchy should govern in accordance with law and not exercising an arbitrary power. The king's government had to observe the law; the king's courts often ruled against the Crown itself; the king could not interfere with private property, and *habeas corpus rule* and the principle of due process presided over criminal proceedings.

The role of the Church in this achievement (consolidated in centuries, of course; as Coke said, nothing is perfect at the same moment that is invented) was paramount. Nevertheless, we must remind that Innocent III himself annulled the charter, and made it in order to stress the superiority of the king on his subjects and so to reaffirm the feudal relationship between England and the Roman Pontiff. The words used by the Pope were very hard:

> *"we utterly reprobate and condemn any agreement of this kind, forbidding, under ban of our anathema, the foresaid king to presume to observe it, and the*

[2] SACKS, J., «Biblical Principles and Magna Carta», in *Magna Carta, Religion and the Rule of Law* GRIFFITH-JONES, R. & HILL, M. (eds.), Cambridge 2015, pp. 301-302.
[3] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s», in *The Oxford History of the laws of England*, I, Oxford 2004, pp. 55-56.

> *barons and their accomplices to exact its performance, declaring void and entirely abolishing both the charter itself and the obligations and safeguards made […] they shall have no validity at any time whatsoever".*

Notwithstanding the strong position of the Pope, the Charter was reissued several times: the last one in 1225, as part of a deal between the King and his Council, realizing a sort of *quid pro quo*: the latter granted the King his funding with taxes, the monarchy confirmed the liberties consecrated in 1215. The link between the lawful exaction of taxes and the role of the (future) Parliament marked a fundamental step in the Constitutional history of Common Law countries, but at that time, the Charter actually marked a significant moment of a long-lasting battle between Church and monarchy.

Fifty years before, in 1164, Henry II issued the Constitutions of Clarendon, which included several norms that tried to limit and reduce the influence of the Church, especially in legal proceedings, hoping to ensure the authority of royal courts over ecclesiastical ones. Only a few years before Runnymede, in 1208, the dispute between King John and Pope Innocent had furiously exploded. The issue was the election of the new archbishop of Canterbury. The King thought he had the right to appoint his own candidate, the cathedral agreed with him, but the Pope annulled the election and consecrated in Rome his candidate: Stephen Langton!

King John declared the appointed archbishop *"enemy of the Crown"*, and in reply Innocent placed England under interdict and excommunicated the King (not even Henry II was excommunicated after the murder of Thomas Becket!).

In 1213, anyway, the King accepted the Roman Pontiff as his feudal lord, in all matters spiritual and temporal (and that is the reason of the reaction of the Pope to the Magna Carta), but in 1215 his enduring weakness made him seal a Charter in which an enforcement clause (no. 61) entitled the barons to divest the king of its authority if he did not comply with his obligations.

Among these obligations there was – or better: the *first* one of them was – the duty to respect the freedom and the rights of the *Anglicana Ecclesia*.

It is not by chance, then, as recent studies suggest, that Magna Carta could have been published mainly by the Church, which had the technical ability to write and distribute copies of the charter, but most of all had a specific interest in preserving and spreading the document. In the uncertain years that followed the Charter, the Church assured its preservation, and it is no coincidence that two of the four surviving copies remained since 1215 in the same places: Lincoln and Salisbury Cathedrals.

As it has been correctly noted, the same factors that *"caused the survival of the physical document – the higher value placed on a written document by churchmen than laymen, and the institutional stability enjoyed by the Church – also played into the survival of the idea of Magna Carta as a guarantee of certain rights"*[4]. The Church played a key role even in supporting the enforcement of the Charter, providing the strongest sanction of the excommunication. On 13 May 1253, for example, the Archbishop of Canterbury and thirteen bishops expressly condemned those who *"by any craft or wiliness do violate, break, diminish, or change the church's liberties and free customs, contained in the charters of the common liberties […] granted by our lord the king"*.

Therefore, it is possible say that the role of the Church was indeed crucial, both in the creation and in the transmission of the charter, which protected the freedom of the Church itself and recognized its fundamental presence in English society. These short historical notes confirm the special sway of the Church on the formation of a document still regarded as a milestone in the development of the rule of law, such a fundamental element of modern democracy.

2. The Role of the Ecclesiastical Courts: the origin of Trusts

[4] McGlynn, M., «From Charter to common law. Rights and Liberties in the Pre-Reformation Church», in *Magna Carta, Religion and the Rule of Law*, Griffith-Jones, R. & Hill, M. (eds.), Cambridge 2015, p. 54.

It is true that Magna Carta was inextricably connected with the Church, and it became an essential foundation of England's complex and enduring balance of political and public powers; but the special influence of the Church is very important, well known and clearly evident for the entire formation of Common Law, and of course in the field of private law, too.

The role of Canon law in the history of English law is clear: first, in the action of the Ecclesiastical Courts, which had, even before 1066, *"a jurisdiction larger than that possessed by any other Ecclesiastical Courts in Europe"*. Then, in the decisive importance of the cultural background, mainly based on canon law, of the holders of administrative and judicial offices of the kingdom, who were often clerics (the members of the King's Chancery were clerics, and the Chancellor himself was always an ecclesiastic - the first layman who was appointed to the office was Thomas More in the 16th century, *et pour cause*!). Finally, for the concrete contents of rules and principles given (and transmitted even after the Reform) to the Equity system: typically characterized by equitable rules derived from canon law, it represented an alternative to the rigidity of the ordinary rules of law, offering a flexible jurisdiction based on concrete needs of the parts.

The influence of ecclesiastical jurisdiction was indeed decisive in marriage, in defining rights and interests in estates, in the development of contracts; but it was paramount even in the concrete shaping of rules and institutions nowadays surrounded by *"an aura of Englishness"*, like wills and trusts.

Actually, many articles of the Magna Carta deal with inheritance, wills, and interests in land. Among the four chapters which directly refer to the Church, whereas article 63 deals with the general freedom of the Church, already sanctioned by clause 1, and article 22 provides that *"no clerk shall be amerced on his lay tenement"* except by the rules set out earlier in the Charter itself *"and without reference to the size of his ecclesiastical benefice"*, it is article 27 that summarizes and confirms the exceptional role of the Ecclesiastical Courts.

According to this clause, *"if any free man dies intestate, his chattels are to be distributed by his nearest relations and friends, under the supervision of the Church, saving to everyone the debts which the deceased owed him".*

Therefore, it is useful to verify how the role played by the Ecclesiastical Courts was unavoidable in establishing the founding principles of these two fundamental fields of private law, wills and trusts, which are are especially meaningful for medieval law, but still characterize nowadays in a very peculiar way the Common Law system.

First, we have to remind that *"some of the courts of the medieval church were impressive by any standard. They were staffed by experienced advocates and proctors, presided over by judges with training in both Roman and canon laws, and administered by qualified subordinate officials"*[5].

It was thanks to the role of these learned Courts, and their enforcement of promises to convey property assigned because of fiduciary reasons, that the *"use"*, ancestor of the trusts, could find a way to develop in English legal tradition. Moreover, as we shall see, it was the necessity of enforcing charitable bequests, especially the *piae causae*, that formally justified the jurisdiction of the Ecclesiastical Courts in testamentary succession.

It is well known that the historical reasons that gave birth to the trusts have to be found in the rigid and complex feudal structure of rights in land, typical of early Common Law. It was substantially prohibited to tenants (except for an express authorization contained in the deed) to assign the land attributed to them, whereas the presence of many *"incidents of tenure"*, i.e. various obligations in favor of the landlord and limits to the possession itself of the land, favored the invention of a way to escape all these limitations.

The solution found was a sort of *"interposition"* of a person (*"feoffee"*), who, through a legal transfer that made him formal holder of the land in Common Law,

[5] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit. p. 207.

committed himself to hold the land *"to the use"* of another person, the real beneficiary (he could be an heir of the settlor, or the settlor itself).

There were concrete advantages in this *"use"*: the possibility to regulate the succession, a deferral of the taxes, a practical escape from the *"escheat"*, i.e. the restitution, in certain cases, of the land to the Lord. However, it was impossibile to enforce *"at law"* the obligation to convey the land to the beneficiary, because the unfaithful feoffee remained formal owner and he was the one who could stand in the ordinary Courts.

On the contrary, thanks to the contemporary development of *ius commune*, in the Ecclesiastical Courts that promise could be enforced, and it was possible to demand a specific performance, because actions *in personam* were admitted (whereas only actions *in rem* were possible in common Courts).

These circumstances, applied to the fiduciary assignment of land, permitted, if the obligations were not fulfilled, to enforce the promise (i.e., the *pactum fiduciae*), because of the *laesio fidei* implied in this conduct. The remedy against the breach of confidence, then, was offered through an application of Canon law rules about the *nuda pacta*, enforcing promises and fiduciary duties implied in the use.

Even after the abrogation of this institution, due to the Statute of Uses of Henry VIII in 1535, the fiduciary attribution of land continued, thanks not only to the strict interpretation of the statutes, typical of Common Law tradition, but also to the creation, simple and imaginative at the same time, of the *"use upon use"*. The assignment to the feoffee of land "*ad usum*" of another person could have determined the transfer *ex lege* of that land to the beneficiary; so that, it was modified throgh a double assignment, to the first fiduciary "*to the use*" of a second one, who owned *"to the use"* of the real beneficiary. This *"use upon use"* was finally denominated *trust*.

The protection offered by the Court of Chancery to the interests implied in the use, and afterwards in the trusts, firmly rooted in the practical, equitable reason

of the absence of enforceability at Common law, but especially in the previous, constant protection offered to confidence by Ecclesiastical Courts. Actually, this *"dual"* protection caused a duplicity of titles: a legal property of the holder (the future trustee), and an equitable property, expression of the interests of the beneficiaries.

We have to note that not only this solution perfectly responded to the well-known needs of mendicant orders, which could not own any goods (actually, among the first documents about the use, there is a manuscript in which land is committed "*communitati villae Oxoniae ad opus fratrum*")[6], but also referred to the notion of *utilitas Ecclesiae*.

This tradition separated the property of the Church by that of the clerics, who could manage and use those properties only for the mission of the Church itself. The Pope was described, then, as *"principal steward, not lord and possessor"* of Church property ("*Res Ecclesiae sunt Papae ut principalis dispensatoris, non ut domini et possessoris*"); the same principle was applicable to clergy, and especially to the Mendicant Orders, who fought many battles about this apparently unsurmountable problem.

Indeed, we cannot forget the difficult dilemma of the medieval clergy: bishops, priests, and friars praised a detachment from wealth and taught faithful to mind the sinfulness of earthly richness, whereas the Church itself had become a powerful institution, which obviously depended upon material possessions. So that, in order to reconcile inconsistencies between the material richness of the Church and the spiritual admonition against the danger of wealth, canonists and other scholars conceived a sort of *"trust"* model, in which the Pope and the clergy did not own Church assets, but actually held them for various beneficiaries (the Church itself, i.e. the poor, or generally the faithful).

[6] See DEVINE, S.W., «The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment before 1535», in *The Journal of Legal History*, 10 (1989) 1, pp. 1-22.

It is clear in these assumptions the echo of Roman Law categories of *fideicommissum* and *usus*, but also of the medieval elaboration of the distinction between *dominium directum* and *dominium utile*, that offered the legal framework for the development of the notion of fiduciary obligation. It has been correctly said, indeed, that *"a hallmark of classical Roman law, the sharp contrast between ownership and possession equipped canonists to distinguish the Church's enduring interest in its patrimony from the temporary and fragile interests of her lieutenants"*[7].

Most of all, anyway, it is possible to see in this construction of a *"double track"*, consisting in a formal ownership of a property and in the binding obligation to use that property to accomplish a fiduciary aim, the relevant role played by confidence, that made settlors choose a particular feoffee (afterwards, a trustee), and compelled them to ask for help the Ecclesiastical Courts in case of breach of obligation of *"conscience"*.

We said that the situation of the beneficiaries against their feoffees was very difficult, because *"common law courts could enforce the duties of a feoffee only if lawyers could figure out how to get a common law writ to fit the case"*[8], but there was no writ for the case (*assumpsit* allowed only money damages at that time). So that, the advantage of a specific performance caused the success of Ecclesiastical Courts, who gave a special legal relevance to the breach of confidence.

It is useful to give some examples. In 1375, the feoffees to uses of a man named John Roger appeared before the judge of Canterbury, because they had been granted land under instruction to convey it to Roger's wife after his death. They had not fulfilled his instructions, but had legal title to the land and under common law the widow, intended beneficiary, would have had no remedy. The judge of the

[7] HERMAN, S., «The Canonical Conception of the Trust», in *Itinera Fiduciae. Trust and Treuhand in Historical Perspective*, HELMHOLZ, R. & ZIMMERMANN, R. (eds.), Berlin 1998, p. 96.
[8] BIANCALANA, J., «Medieval uses», in *Itinera Fiduciae. Trust and Treuhand in Historical Perspective*, HELMHOLZ, R. & ZIMMERMANN, R. (eds.), Berlin 1998, p. 148.

ecclesiastical court decided that the feoffees should be obliged to fulfill the fiduciary obligation imposed upon them.

In 1442, Walter Harald, rector of a parish church, was cited to answer, *"with what intention he had received the feoffment"* of the lands of a man named William Marlowe. He replied that he had received it only "*ad usum et opus divini servicii cantarie ecclesie*", i.e. to the use of divine service in a chantry, so refuting the claims of the plaintiff, who claimed to be the true beneficiary. *"Thus did this ecclesiastical court enforce this trust-like institution"*[9], exactly because *"the basic idea that lay behind it was a familiar one in the* ius commune*; the duty of a fiduciary cemented by an oath"*[10].

Ecclesiastical Courts ordered individuals to live up to their promises, and this was just the beginning of a long-lasting path, which in early-modern England progressively characterized the Court of Chancery (and its enforcement of uses and trusts) as a *"Court of Conscience"*.

The use of the notion is far from the contemporary legal use, which deals with conscience as the individual person's moral judgement, a subjective sense of right and wrong, protecting it from the law (*"freedom of conscience"*), whereas it was used in those Courts as an objective standard of conduct.

Conscience was not a mere subjective opinion, or a moral personal preference, but a more concrete evaluation of an action or a conduct with reference to a shared sense of ethics; so that, the well-known conundrum of Modern Law *"subjective conscience vs. objective law"* had no sense, or at least a different meaning. The exception, made applying a different criterion of judgement, was not *"against"* the law. Rather, conscience *"integrated"* law, because the strict

[9] HELMHOLZ, R., «Trusts in the English Ecclesiastical Courts 1300-1640», in *Itinera Fiduciae. Trust and Treuhand in Historical Perspective*, HELMHOLZ, R. & ZIMMERMANN, R. (eds.), Berlin 1998, 158.
[10] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit., p. 421.

interpretation of the forms of action that were typical of Common Law did not permit to enforce (what was intended as) a *"right"* interest.

Therefore, Courts of conscience, deciding cases "*secundum conscientiam et non secundum allegata*", did not think to themselves as a possibility to escape law. Confidence was protected in Ecclesiastical Courts, because the duty to convey land was enforced due to the promise made (or implied in its conduct) by the feoffee. The *laesio fidei* imported the specific performance of the sworn promise, and the sanction for not having complied the order of the Court was excommunication ("*compulsio per viam excommunicationis*").

Finally, a promise to convey land to a beneficiary, even if the feoffee (the future trustee) was legally owner of the property at law, could not be broken according to Church's teachings, because that breach of confidence was a sin, and "*peccatum non dimittitur, nisi restituatur ablatum"* (the property was *"ablata"*, i.e. stolen, even if the law could not enforce its conveyance to the beneficiary).

That was the origin of the trust, still considered a typical institution of English legal tradition, but currently widespread in different legal traditions, even in Civil Law systems, with worldwide success. In a trust, property is assigned to a person in order to satisfy the interests of a beneficiary (or of a group of beneficiaries), or to serve a purpose. The practical reasons of this assignment can be various. A settlor wants to regulate the transmission of assets to his descendants, without attributing ownership or sharing his property among them; maybe he is not able to manage his property, or perhaps prefers that a professional take care of his investments; he could even be afraid of future creditors, or try to obtain tax savings.

Notwithstanding all these (and other) reasons, typical of contemporary societies, it is curious to find the roots of this complex and useful legal institution in the Ecclesiastical Courts of English Middle Ages.

3. TESTAMENTARY LAW

Similar is the reason of the competence acquired by Ecclesiastical Courts in the other field we have decided to consider, inheritance.

Starting from the protection of the actual will of the deceased, often oriented to a charitable bequest in favor of the Church and for the salvation of his soul, Ecclesiastical Courts used canon law in order to overtake the formalities and even the necessity of a written will. Asserting a definite role in the enforcement of charitable bequests, the Church took upon itself the supervision of the whole process of succession, enhancing the consequences of the contemporary canonical texts, which literally proclaimed that a person's last wishes *"shall in all things be carried out"*.

The result was a jurisdiction over succession that lasted for centuries, and ended only in 19th century; a competence that was so large to differ in a significative amount even from the role played by Ecclesiastical Courts in the *ius commune*, and whose effects still influence directly the Probate jurisdiction in all Common Law countries.

Although many of its features were connected to, and sometimes derived from, canon law, the primary jusrisdiction over wills and intestate estates given by English legal system to Ecclesiastical courts is indeed difficult to explain. Actually, even if royal courts struggled to affirm their competence in many fields, there is no record of steps taken to prevent this usurpation of temporal claims in this peculiar subject, which meant so much for the population.

It is true that English law made (and went on making, up to recent years) a basic division between succession to land and succession to chattels, and only jurisdiction over the latter was reserved to ecclesiastical courts, but the large extension of this category (that comprehends many rights and interests that Civil law ascribes to the realm of *"absolute"* rights) confirms the fundamental role of the Church in this field. Furthermore, the division between lands and chattels, even if established in practice and jurisdiction, was in many cases not clear: *"there were*

many areas of overlap, and neither the royal courts nor the ecclesiastical courts could keep entirely on 'their side' of the fence dividing the two"[11].

Another special characteristic of this jurisdiction was the role played by the testamentary executor. The Gregorian decretals sanctioned the place of this figure, who had to carry out the last wishes of decedents. With the reception of Roman law, the importance of the executor decreased on the Continent, whereas the office assumed a paramount importance in England. It was the executor *"and all that went with it – the executor's representation of the decedent, his replacement of the heir of the Roman law, and his subjection to direction by the courts – that gave English testamentary law the special character it retained"*[12]: and all this was a product of the Ecclesiastical jurisdiction over testamentary law.

We saw that Magna Carta sanctioned the *"supervision"* of the Church over the distribution of a deceased's chattels, but also provided that they should pass to his executors, who had to carry out his dispositions. Ecclesiastical legislation confirmed those norms, but also formulated in broader terms the general principles contained in canon law about the respect of last wills, affirming even that those who impeded their execution should be *ipso facto* excommunicated.

The ways in which a testament could be impeded were many, indeed: one could retain goods made object of a bequest, interfere with the executor's activity, or contest the transcription of the very last words of a deceased.

By these means, all testamentary matters came to the Ecclesiastical courts, which established some fundamental principles. For example, they affirmed the right of villeins, as Christians and human beings, and even of men under a sentence of excommunication, to make a valid will; moreover, they implemented the meaning of the term *causa pia*, not limiting the bishops' role in securing the enforcement of bequests only to those devoted to pious cases in a strict sense. In doing this,

[11] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit., p. 398.
[12] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit., p. 391.

Ecclesiastical courts and scholars (the most important of them was William Lyndwood) defended the largest jurisdiction of English Church even against the current interpretation of canon law, which on the contrary restricted the importance of clergy in this field.

As we said, the role of the Ecclesiastical Courts was substantial also in lessening the formalities that Roman law needed to have a valid testament. It is true, for example, that oral (or nuncupative) will was sanctioned if seven persons witnessed the declaration of the testator, and that canon law already reduced the number of witnesses required, but English Ecclesiastical courts substantially equalized written and oral testaments, admitting even that a nuncupative will might revoke a written one. *"This result was contrary to the Roman law, but it was in line with the canonists' desire to discover and give effect to a dying man's* verba novissima*"*[13].

Another interesting question is the testamentary capacity of married women. The capacity of unmarried women and of widows was not disputed, but when a woman married, according to Common Law her property passed to the husband. So that, she could make a valid will only with his permission. The rule of the *ius commune* was exactly the reverse, and first it was reaffirmed by English Ecclesiastical Courts; anyway, notwithstanding the strong position of the Church (those who impeded women to dispose of their property were declared *ipso facto* excommunicate), during the 15th century women lost this right, because Common Law prevailed even in the application made by the Church's courts.

Anyway, apart these peculiar cases, the role of the Courts was essential in determining the mechanics of the probate, sanctioning a form of proceeding that, as we said, in many aspects is still the same in modern Common Law systems.

After having ascertained the existence of the assets, the Courts approved the will and confirmed the executor. He had to compile an inventory of the estate, and

[13] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit., p. 400.

submit it to the Court; then, the actual administration of the estate began, in order to carry out the last will of the deceased, always under the strict direction of the Court itself. At the end of the process, the executor submitted his account and received the discharge. It is important to note that the same steps exist today: after having obtained his grant of probate, the executor has to face the administration and the distribution of the assets under the supervision of a Court.

Furthermore, English Ecclesiastical Courts made a very frequent use of trust-like devices in probating the last wills of a deceased person, for example if property had been bequeathed to children, or in the case of charitable bequests. This is another consequence of the extension and the peculiarity of their jurisdiction, in which *"Roman law applied only in those parts which the Church found appropriate; the formal canon law was brief and inadequate, and the common law was in turns indifferent and menacing in dealing with ecclesiastical jurisdiction"*[14].

Through these two examples, trusts and wills, I think we made it clear that the role of the Church in the history of Common law tradition is so evident, that, as a famous scholar said: *"any account of English legal development that does not take account of ecclesiastical jurisdiction is therefore an incomplete account"*[15].

We have to start from a precise assumption about the role of Canon Law towards history and interpretation of legal systems: i.e., the existence of an unavoidable relation of reciprocal enrichment with legal culture in general. On the one hand, actually, the importance of Canon Law for contemporary legal experiences is based not only in the concrete contents that it historically gave to different systems, but also in its possibility to represent an integrated model of science and practice, of rules and flexibility, very useful to go beyond the *"legalistic"* grounds of state systems. On the other, that relation prevents scholars from affirming an *ontological*

[14] HELMHOLZ, R.H., «The Canon Law and Ecclesiastical Jurisdiction from…», cit., p. 400.
[15] HELMHOLZ, R.H., «Trusts in the English Ecclesiastical Courts 1300-1640», in *Itinera Fiduciae. Trust and Treuhand in Historical Perspective*, HELMHOLZ, R. & ZIMMERMANN, R. (eds.), Berlin 1998, 154.

difference between canon law and other systems, confirming on the contrary its strictly *legal* essence, result of a complex historical evolution and of an undeniable systematic *"fusion"*.

Indeed, we have to keep in mind (and the events connected with the Magna Carta show us clearly this assumption) that Canon Law has formed and still lives in constant relation with other legal experiences. Since its initial formation in Roman institutional system, then in the admirable age of *ius commune*, up to the modern and various contrast with the hegemonic claims of national laws and the age of codification. Therefore, it has not only borrowed, in a relation that was always biunivocal, institutions, notions, mentalities, but also decisively contributed to the development of great contemporary legal systems. Ultimately representing, as the great Italian scholar Paolo Grossi once said, a sort of *"yeast"*, *"un lievito"*, not only for Western legal tradition, but for the entire Western civilization.

Therefore, starting from the decisive role of the Church in shaping, through the Great Charter of 1215 and its enforcement, the rule of law that still presides to the freedom of individuals and their equal subjection to the law itself, we could agree with Larry Siedentop, who said in his precious book *Inventing the Individual* that *"secularism is Christianity's gift to the world"*. Moreover, he describes the origins of Western individualism affirming that its development *"from the sixteenth to the ninenteenth century resembles nothing so much as the stages through which canon law developed from the twelfth to the fifteenth century. The sequence of argument is quite extraordinarily similar. The canonists, so to speak, «got there first»"*[16].

It is desirable that, through a fruitful cooperation with scholars of different subjects and through a careful comparison with different legal systems and traditions, canonists can come back to their ancient role, and *"get there first"* again.

[16] SIEDENTOP, L., *Inventing the Individual. The Origins of Western Liberalism*, London 2014, p. 359.